Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN, JR.; and ANDY J. MCMULLEN,
Petitioners

V.

UNITED STATES OF AMERICA; KCS RESOURCES, INCORPORATED; TESORO EXPLORATION AND PRODUCTION COMPANY; TRANSTEXAS GAS CORPORATION, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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4pp

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Attorney for Petitioners

THE QUESTIONS PRESENTED FOR REVIEW

1. Did the District Court correctly rule without a hearing that Bank One Group's Second Amended Complaint should be dismissed on the ground of lack of subject matter jurisdiction?

2. Does it appear beyond doubt that Bank One Group can prove no set of facts to support its claim that this action was brought within twelve years after Remaindermen knew or should have known of the claim of the Government to the subject parcels?

LIST OF ALL PARTIES TO THE PROCEEDING
IN THE FIFTH CIRCUIT COURT OF APPEALS

The United States of America, Respondent, specifically the following Departments and Bureau:

State Department of the United States of America
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1849 C St. NW
Washington, D.C. 20240

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Brenham, TX 77833

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9158 Drumcliffe
Dallas, TX 75231

John McMullen, Jr., Petitioner
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Austin, TX 78703

Andy J. McMullen, Petitioner
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Hamilton, TX 76531

ANR Production Company, Respondent
Coastal Oil & Gas Corporation, Respondent

C/O Ms. Elizabeth N. Miller
Ms. Jane M.N. Webre
Scott, Douglass, Luton & McConnico, L.L.P.
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Jaffe Energy, Inc., Respondent
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KCS Resources, Incorporated, Respondent
C/O William T. Armstrong, III
Charles Roberts
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Tesoro Exploration and Production Company, Respondent
Tesoro E & P Company, L.P., a Limited Partnership,
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C/O Ms. Elizabeth N. Miller
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Houston, TX 77032-2949

The following (who are not Parties to this Action) claim under Oil and Gas Lease(s) given by the Government, which cover 1/16 mineral interests which are subjects of this Appeal:

Counsel for TransTexas Gas Corporation has advised the undersigned that the following persons, whose addresses are unknown to the undersigned, claim under instrument(s) of

assignment or similar instrument(s):

Ben A. McCarthy
Erik G. Hanson
George E. Jochetz, III
Billy C. Collins
Lauro Almaraz Jr.
Chris W. Douglas
Patrick E. McGee
Gregory D. Linton
John J. Surko
Richard P. Lucas
C. Anthony Freitas

Attorneys of Record for the Parties to the action before the Fifth Circuit Court of Appeals:

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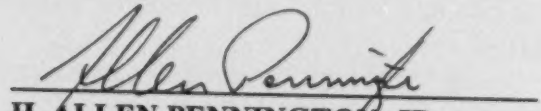
1300 East North Belt, Suite 310
Houston, TX 77032

Dated this 9th day of March, 1999.



H. ALLEN PENNINGTON, JR.
Attorney of Record for Petitioners,
Bank One, Texas, N.A., Trustee of the
Red Crest Trust; Lelia Beatrice Cox
Harris; Linda Harris Beard; Margie
Harris Newtown; John H. McMullen,
Jr.; and Andy J. McMullen

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B - *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997

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D - *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered August 15, 1997

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E - Order Denying Petition for Rehearing of the United States Court of Appeals for the Fifth Circuit, filed December 23, 1998

Fifth Circuit Order

F - *Second Amended Complaint to Adjudicate Title to Real Property Pursuant to 28 U.S.C. § 2409a*, together with the following attachments thereto:

Exhibit "A" - Will of Susie McMullen Langille

Exhibit "B" - Codicil to Will of Susie McMullen Langille

Exhibit "C" - Conveyance from H. J. McMullen to McMullen Oil & Royalty Company, Inc., dated November 19, 1928, which appears in Vol. 20, at p. 87 of the Deed Records of Zapata County, Texas

Exhibit 1 - Relevant Portions of *Amended Petition in Condemnation No. 3*

Exhibit 2 - Relevant Portions of *Amended Petition in Condemnation No. 12*

Exhibit 3 - Relevant Portions of *Offer to Lease and Lease for Oil and Gas* from United States Department of the Interior, Bureau of Land Management to Tesoro Exploration and Production Company, dated August 1, 1989
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G - Copy of Unpublished Opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 97-40149, *United States of America v. 85,237 Acres of Land, More or Less, Et Al* (the Condemnation Action), filed September 17, 1997

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, BANK ONE, TEXAS, NATIONAL ASSOCIATION, Trustee of the Red Crest Trust; LELIA BEATRICE COX HARRIS; LINDA HARRIS BEARD; MARGIE HARRIS NEWTOWN; JOHN H. MCMULLEN,

JR.; and ANDY J. MCMULLEN (jointly referred to herein as "Bank One Group") respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled case on October 16, 1998.

OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS BELOW

The October 16, 1998 opinion of the Court of Appeals, herein sought to be reviewed, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at A). The December 23, 1998 Order of the Court of Appeals denying Petitioners' *Petition for Rehearing* is unpublished and is reprinted in the separate *Appendix* to this Petition (at E). The prior *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at B). The prior *Order of Dismissal* of the United States District Court for the Southern District of Texas, Laredo Division, filed July 11, 1997, is unpublished, and is reprinted in the separate *Appendix* to this

Petition (at C). The prior *Memorandum and Order* of the United States District Court for the Southern District of Texas, Laredo Division, entered August 15, 1997, is unpublished, and is reprinted in the separate *Appendix* to this Petition (at D).

STATEMENT OF THE BASIS OF JURISDICTION IN THIS COURT

The Judgment of the Court of Appeals was entered October 16, 1998. On December 23, 1998, the Court of Appeals denied Petitioners' *Petition for Rehearing*. The jurisdiction of this Court is invoked pursuant to *28 U.S.C. § 1254(1)*.

CONSTITUTIONAL PROVISIONS, STATUTES, RULES AND REGULATIONS INVOLVED IN THE CASE, SET OUT VERBATIM WITH APPROPRIATE CITATION

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Fifth Amendment

> No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATUTES

28 U.S.C. § 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. § 2409a

(a) The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. . .

(g) Any civil action under this section, except for an action brought by a State, shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

V.T.C.A. Civil Practice & Remedies Code § 17.002. Suit Against Estate For Land Title

In a suit against the estate of a decedent involving the title to real property, the executor or administrator, if any, and the heirs must be made parties defendant.

V.T.A.S. Probate Code
§ 37. Passage of Title Upon Intestacy and Under a Will

When a person dies, leaving a lawful will, all of his estate devised or bequeathed by such will, and all powers of appointment granted in such will, shall vest immediately in the devisees or legatees of such estate and the donees of such powers; and all the estate of such person, not devised or bequeathed, shall vest immediately in his heirs at law; subject, however, to the payment of the debts of the testator or intestate, except such as is exempted by law; . . .

FEDERAL RULES OF CIVIL PROCEDURE

RULE 17(a) See *Appendix* at H

RULE 17(b) See *Appendix* at H

RULE 17(c) See *Appendix* at H

RULE 55

(b) Judgment. Judgment by default may be entered as follows:

. . .

(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least 3 days

prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

(c) Setting Aside Default. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

RULE 60

(b) Mistakes, Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one

year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

RULE 71A(c)(d) & (f) See *Appendix* at H

TERMS OF REFERENCE

In the interest of brevity, the following terms of reference in addition to "Bank One Group", are employed:

1. "this action" refers to proceedings in the District Court and Court of Appeals below;

2. "the Bank" refers to the Fort Worth National Bank of Fort Worth, Texas, but not to Bank One, Texas, N.A., one of the current petitioners.

3. "the Condemnation Action" refers to Civil Action No. 529, also referred to as Civil Action L-529, in the United States

District Court for the Southern District of Texas, Laredo Division;

4. "the Corporation" refers to McMullen Oil & Royalty Company, Inc., a Texas Corporation;

4. "the Government" refers to the United States of America;

5. "Langille Trust" refers to the Susie McMullen Langille Testamentary Trust;

6. "Langille Will" refers to the probated Will and Codicil of Susie McMullen Langille;

7. "Remaindermen" refers to Glenn Harris, Jr.; John H. McMullen, Jr. and Andy J. McMullen, who were and are the heirs of the body of the children of Susie McMullen Langille; "Remainderman" does not include Bank One, Texas, N.A.;

8. "subject parcels" refers to the 1/16 mineral interests which Bank One Group presently claims, which are the subjects of this case; and

9. "Trustee" refers to Bank One, Texas, N.A., Trustee of the Red Crest Trust.

STATEMENT OF THE CASE

1. STATEMENT OF FACTS

Identification of Property in Which Bank One Group Claims an Interest

The following is a listing of the subject parcels.

No. assigned to parcel in Civil Action No. 529 Co., Texas	Number of acres in parcel	Location within Porciones 14, 15, 16 & 17 in Zapata
Z-27-A	225.521	all of Share No. 28-A
Z-30-A	286.883	Share No. 21
Z-32-A	122.94	Share No. 20
Z-36-A	10.750	Share No. 39
Z-37-A	58.206	Share No. 26
Z-54.1-A1	27.420	Share No. 23
Z-54.1-A2	69.080	Share No. 23
Z-54.2-A	144.780	Share No. 23
Z-62-A	137.917	Share No. 18A

Statement of the History, Nature and Extent of the Interests Claimed by Bank One Group

In 1926, Judgment was entered by the 49th District Court of

Zapata County, Texas, partitioning Porciones 14, 15, 16 and 17 into shares. Shortly after the partition, certain owners of shares conveyed a 1/16th mineral interest to M. J. Raymond, a Laredo, Texas, attorney, apparently in payment for legal services rendered in connection with the partition action, by general warranty deeds.

By Mineral Deed dated April 15, 1927, M. J. Raymond conveyed to H. J. McMullen the undivided 1/16th mineral interests. This conveyance was also in the form of a general warranty deed.

In 1928, H. J. McMullen executed a conveyance to McMullen Oil & Royalty Company, Inc. ("the Corporation" herein). This conveyance provides that its purpose and intention is

> to entirely divest H. J. McMullen of all right or control over the oil, gas or other minerals in the property described in this instrument, save and except the right to receive the royalty oil, gas and other minerals, or the moneys payable from the sale thereof, and it is the purpose and intention of this instrument to vest in McMullen Oil & Royalty Company, Inc., the full right, in its own name to execute oil, gas and mining leases on the oil, gas or mineral interest or [sic] land now or hereafter owned by H. J. McMullen or standing in his name, in Zapata County, to such persons, firms or corporations as it may deem best and on such terms and for such bonus moneys and delay

rentals as it may deem best, and that all such cash payments, bonus moneys and delay rentals shall be paid to McMullen Oil & Royalty Company, Inc., and H. J. McMullen, his heirs, representatives and assigns shall never have any interest therein nor in any way be entitled to any part thereof.

H. J. McMullen died in 1934, leaving a will which was probated, which left his assets to Susie McMullen, his widow (later Susie McMullen Langille).

No Notice of the Condemnation Was Served on the Corporation

The Corporation was named as a defendant by the Government in the Condemnation Action, as an owner of the subject parcels. The Corporation was never dismissed as a Defendant. Although it was listed as being a Texas Corporation, with its office located in Fort Worth, Texas, the Corporation was never served with notice of the Condemnation Action.

The executive right and the right to receive bonuses and delay rentals from the subject parcels were owned by the Corporation from 1928 until the Corporation was dissolved in 1966. At that time (the dissolution), the remainder interests in what had been the Corporation's rights in the subject parcels

vested directly in Remaindermen. Then, pursuant to Langille Will, so long as a child of Susie McMullen Langille survived, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were in the Langille Trust. Upon the termination of the Langille Trust, possession and the right to present enjoyment of the executive right and the right to receive bonuses and delay rentals in the subject parcels were vested in Remaindermen. *Logan v. Logan*, 156 S.W.2d 507, 512 (Tex. 1941); *Heinzman v. Coon*, 290 S.W.2d 219, 221 (Tex. 1956).

Non-joinder of, and No Notice to, Remaindermen of Susie McMullen Langille Will

Susie McMullen Langille, the widow of H. J. McMullen, left a Will dated October 20, 1938 (*Appendix* at F-Exhibit "A"), and a Codicil to said Will dated November 3, 1938 (*Appendix* at F-Exhibit "B"). Langille Will provided for the creation of a testamentary trust, Langille Trust, to be administered by The Fort Worth National Bank of Fort Worth, Texas ("the Bank"). Provisions III. H and I, appearing on page 9 of the Will provide:

H. If either of my two children shall predecease me, or at the death of either of my children, after my death, the interest of such deceased child in the Trust Estate herein created, both as to net income and as to principal, shall go to and be for the use and benefit of the survivor.

I. At the death of the survivor of my children, one or both of them surviving me, then this Trust Estate shall terminate and the principal of the Trust Estate then remaining in the control of the Trustee, shall be delivered and paid over to the heirs of the body of my children, per stirpes and not per capita.

Upon the probate of Langille Will, Remaindermen were vested with a remainder interest in the subject parcels because Glenn Harris, Jr., a Remainderman, was alive during the lifetime of Susie McMullen Langille. He lived until the late 1980's.

Upon the death of Mrs. Paul Bowden, a/k/a Jeannie A. Hall (the last surviving child of Susie McMullen Langille) in December, 1984, Remaindermen became vested with possession and enjoyment of the subject parcels, free of trust. Remaindermen's interests were as follows: Glenn Harris, Jr., one-half (l/2); John H. McMullen, Jr., one-fourth (1/4); and Andy J. McMullen, one-fourth (1/4). Remaindermen were all of Susie McMullen Langille's grandchildren. John H. McMullen, Jr. was

born in 1944. Andy J. McMullen was born in 1948. No one appeared on Remaindermen's behalf in the Condemnation Action prior to 1995, when Bank One Group filed a Rule 60(b) Motion in the Condemnation Action.

Remaindermen were settlors of Red Crest Trust. In 1985, Remaindermen transferred mineral and royalty interests in the subject parcels to Texas American Bank/Fort Worth, N.A., as Trustee of the newly created Red Crest Trust. In 1989, the Federal Deposit Insurance Corporation, as receiver, transferred the trust assets of the failed Texas American Bank/Fort Worth, N.A. to Team Bank. Team Bank merged into Bank One, Texas, National Association in 1992. Accordingly, Bank One, Texas, National Association is the duly constituted Trustee of the Red Crest Trust. Therefore, Bank One Group stands in the position of Remaindermen.

Lelia Beatrice Cox Harris, Linda Harris Beard and Margie Harris Newtown are the widow and children, respectively, of Glenn Harris Jr., who died after the creation of Red Crest Trust.

Remaindermen were not named as parties in the

Condemnation Action, received no notice of the Condemnation Action, nor was a guardian ad litem or attorney ad litem appointed by the Court to represent their interests in the Condemnation Action. They also had no notice of their right to retain their oil and gas and mineral interests under the subject parcels, as created by the Government's *Amended Petition in Condemnation No. 3*, as supplemented by the Government's *Amended Petitions in Condemnation No[s]. 4* through *14* (specifically Paragraph 1 of *Amended Petition in Condemnation No. 12*, filed March 6, 1956) in the Condemnation Action. (See *Appendix* at F-Exhibits 1 and 2).

Such right of election had no limit on its duration and was never withdrawn by the Government.

On March 14, 1960, the Government filed a brief consisting of seventy-two (72) pages in the Condemnation Action, entitled *Plaintiff's Brief Covering The Taking of The Negative Easement Estates Affecting The Minerals Only, Before the Special Commission*. In this brief, the Government discussed the history of the mineral estates located within the Falcon Dam and

Reservoir. Excerpts follow:

> Declaration of Taking No. 1 in Civil Action No. 529 was filed on January 3, 1950, and the fee simple title was sought to all lands lying below a "325 foot elevation traverse",. . .
>
> Amendment No. 3 was a complete amendment and amounted to a new Petition in Condemnation for all practical purposes
>
> There was a change of attitude indicated by the filing of Amendment No. 3, as reflected in these words: "In all of the other lands in Tracts A and A-2, the fee simple estate, provided, however that the owners of the oil and gas in and under said tracts may, at their election, retain title to said oil and gas, subject to the terms of the negative easement. . . provided, however that exploration and development of oil and/or gas under said lands will be permitted by directional drilling from locations above the 325-foot elevation traverse . . .".
>
> . . . Not only were the minerals returned in the basin of the reservoir, but the partial negative easement drilling restriction was eliminated from the top of the earthern wings of the dam at elevation 325 down to the actual top of the steel gates at the 307-foot elevation, subject only to a flowage easement from the 307 to the 314-foot elevation traverses.

In this case the Government admitted to a change of position in [the Government's] *Reply Brief in Support of Motion for Summary Judgment* in this cause, in which the Government

states:

> After the filing of the Declaration of Taking No. 1, the International Boundary and Water Commission reevaluated the project plans and revised its property acquisition requirements. During this process it was decided that it would be sufficient to take a fee simple title up to the 307 foot contour elevation instead of the original 325 foot contour elevation. As a result, the government filed its Amended Petition in Condemnation No. 3 on January 16, 1952.

The only Notice ever served on the Bank only advised as follows:

> You are hereby notified that a complaint in condemnation and amendments thereto have heretofore been filed in the office of the Clerk of the above named Court in an action to condemn the following defined estates:
>
> . . .
>
> The fee simple title absolute to those parcels of land, the numbers of which have the letter "A" as a suffix, for example, Z-1-A, Z-31-A1; and portions of the following parcels: Z-30-AB, Z-34-AB through Z-37-AB, Z-40-AB, Z-52.1-AB, Z-55-AB, Z-60-AB through Z-62-AB, subject to existing easements for public utilities and public highways.

No notice was given to the Bank (the Fort Worth National Bank) of the right of revestiture which had been created by *Amended Petition in Condemnation No. 3*, which had been filed almost four

years prior to the issuance of the Notice to the Bank.

Only with the filing of *Amended Petition in Condemnation No. 12*, did the right of revestiture in the Corporation, Langille Trust and Remaindermen become known. Unfortunately, the Bank received no notice of the filing of *Amended Petition in Condemnation No. 12*, which was filed after the Bank had been served with notice and had failed to appear.

Revestitures were in fact entered regarding the oil and gas and the mineral estates for all of the subject parcels. Stipulations were entered into between the Government and individuals having an obligation to H. J. McMullen, his heirs and assigns, to warrant and defend title to the 1/16th mineral interests in the subject parcels. Specifically, the Stipulations were entered into between the Government and the grantors to M. J. Raymond of the 1/16th mineral interests in the subject parcels, or such grantors' heirs/devisees.

The Judgments upon such Stipulations found that oil and gas would be excepted from condemnation, but provided for a negative easement in favor of the Government to control the

methods of drilling or deepening of any well for the purpose of producing oil and/or gas. The negative easement basically permitted directional (slant) drilling. Many of the Judgments upon such Stipulations **completely revested the mineral estates** of portions (sub-parcels) of the subject parcels in their former owners in fee simple (such revested sub-parcels being located between the 307 and 325 feet contour elevations).

The United States Commissioner of the International Boundary and Water Commission, United States and Mexico, acting for and on behalf of the Secretary of State of the United States of America, amended *Declaration of Taking No. 1* in Civil Action No. 529 by filing a map entitled *Supplement-4 to Exhibit C to Declaration of Taking No. 1* ("The Map"). The Map was filed with the Court Clerk of Zapata County, Texas.

The following sub-parcels, carved out of the subject parcels, appear on The Map:

TRACT 1. Those Sub-Parcels vested in the Government in fee simple, **save and except oil and gas**:

No. 27	217.181 acres
No. 30.1	144.280 acres
No. 30.2	51.313 acres

No. 32	88.56 acres
No. 37	29.776 acres
No. 54.1 [1]	183.09 acres
No. 62.1	15.698 acres
No. 62.2	7.819 acres

[1] Consists of 40.46 acres out of Parcel Z-54.1-A2 and 142.63 acres out of Parcel Z-54.2-A

TRACT 2. Those Sub-Parcels revested in the former owners, subject to Flood Easement:

No. 27.1F	1.82 acres
No. 27.2F (referred to as 27.3-F in Judgment of Revestiture)	6.52 acres
No. 30-F	56.00 acres
No. 32.1-F	4.43 acres
No. 32.2-F	25.81 acres
No. 36-F	3.00 acres
No. 37.1F	2.28 acres
No. 37.2-F	16.07 acres
No. 54.1-F	16.54 acres
No. 54.2-F [2]	4.29 acres
No. 54.3-F	16.91 acres
No. 62-F	41.98 acres

[2] Consists of 2.14 acres out of Parcel Z-54.1-A2 and 2.15 acres out of Parcel 54.2-A

TRACT 3. Those Sub-Parcels revested in former owners, subject only to existing highway and utility easements:

No. 30-R	127.79 acres
No. 32-R	289.28 acres
No. 36-R	93.98 acres
No. 37-R	224.66 acres
No. 54-R	100.93 acres

No. 62.1-R 401.34 acres
No. 62.2-R 2.52 acres

2. COURSE OF PROCEEDINGS AND DISPOSITION IN DISTRICT COURT BELOW

Bank One Group filed its *Complaint To Adjudicate Title To Real Property Pursuant to 28 U.S.C.§ 2409a* on April 15, 1996.

Bank One Group filed its *Second Amended Complaint To Adjudicate Title To Real Property Pursuant to 28 U.S.C.§ 2409a* on December 7, 1996, after having obtained leave of Court on December 7, 1996.

On November 26, 1996, the Government filed its *Motion To Dismiss For Lack Of Subject Matter Jurisdiction* . Bank One Group filed its Brief and Response on December 16, 1996.

On December 16, 1996, the Government filed its *Motion To Dismiss Second Amended Complaint*, which incorporated the Government's Motion to Dismiss filed on November 26, 1996. On December 30, 1996, the Government filed its Reply Brief. On January 3, 1997, Bank One Group filed [its] *Response To The Government's Motion To Dismiss Second Amended Complaint.* On January 22, 1997, Bank One Group filed additional authorities.

On July 11, 1997, the Court entered its *Memorandum and Order* and *Order of Dismissal*, which granted *[the Government's] Motion to Dismiss Second Amended Complaint.*

On August 15, 1997, the District Court entered its *Memorandum and Order* which denied [Bank One Group's] *Motion And Brief Pursuant To Fed. R. Civ. P. 59(e) to Alter Or Amend The Court's Memorandum And Order Dated July 11, 1997 . . . And Order of Dismissal Dated July 11, 1997* and which overruled [Bank One Group's] *Motion for Summary Judgment.*

3. THE BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The District Court had subject matter jurisdiction pursuant to *28 U.S.C. § 2409a, the Quiet Title Act.*

ARGUMENT FOR ALLOWANCE OF THE WRIT

Questions 1 and 2 Presented for Review

Summary. The Opinion and Judgment of the Court of Appeals is contrary to *Scheuer v. Rhodes*, 416 U.S. 232, 94 S. Ct. 1683, 40 L.Ed.2d 90 (1974) and *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957). The statute of limitations provision

contained within the *Quiet Title Act [28 U.S.C. § 2409a(g)]* provides

> that the statute of limitations will not begin to run until the plaintiff "knew or should have known of the claim of the United States,". . . *U. S. v. Beggerly*, 118 S.Ct. 1862 and 141 L.Ed.2d 32 (1998).

In *Scheuer v. Rhodes, 94 S.Ct. at 1686*, the Court held

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80

(1957) . . .

Remaindermen were vested in the title to the subject parcels upon the probate of Langille Will in 1938. *McGill v. Johnson*, 799 S.W.2d 673, 675, 677 (Tex. 1990); *Chadwick v. Bristow*, 146 Tex. 481, 208 S.W.2d 888, 891 (1948); *Bufford v. Holliman*, 10 Tex. 560, 575 (1853); *V.A.T.S. Probate Code, § 37*; *Rust v. Rust*, 211 S.W.2d 262, 267 (Tex.Civ.App.-Austin 1948), aff'd 147 Tex. 181, 214 S.W.2d 462 (Tex. 1948). Lewis M. Simes and Allan F. Smith, *The Law of Future Interests*, Second Edition (1956) Vol. 2, p. 126 § 658 states:

> Whenever there is a preceding estate for life or for years or a preceding trust to pay the income to someone other than the members of the ultimate class of beneficiaries, that fact could be used to justify a holding that the ultimate gift is vested.

A life estate with power of sale is still only a life estate. An unexercised power of sale leaves both the life and remainder estates unaffected. *Calvert v. Thompson*, 339 S.W.2d 685 (Tex.Civ.App.-Austin 1960, writ ref'd); *Rekdahl v. Long*, 417 S.W.2d 387, 392 (Tex. 1967).

Fed. R. Civ. P. 71A(f) required that Remaindermen be given

notice of the filing of the Condemnation Action and of the *Amended Petitions in Condemnation*, which provided for their right of election to retain the subject parcels.

Two of the Remaindermen, John H. McMullen, Jr. and Andy J. McMullen, who were vested in the remainder interest in the subject parcels, were small children (minors) when the *Petition in Condemnation* was filed. Neither of these Remaindermen was named as a party in the Condemnation Action, neither received notice, no one appeared on their behalf, nor was an attorney ad litem or guardian ad litem appointed to represent their interest before the Court.

Fed. R. Civ. P. 17(c) provided in part:

> The Court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person.

Fed. R. Civ. P. 55(b)(2) states

> no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative **who has appeared therein**. (emphasis supplied)

Fed. R. Civ. P. 55(c) provides as follows:

> For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Fed. R. Civ. P. 71A(c) provides, in part:

> Upon the commencement of the action, the plaintiff need join as defendants only the persons having or claiming an interest in the property whose names are then known, but prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned.

Fed. R. Civ. P. 71A(d)(1) provides, in part "Additional notices directed to defendants subsequently added shall be so delivered."

Remaindermen were so identified as a class in the Langille Will, with which the Government was obviously familiar.

Fed. R. Civ. P. 17(a) provides that the trustee of an express trust may sue in the name of the Trustee, without joining the party for whose benefit the Condemnation Action is brought.

However, *Fed. R. Civ. P. 17(b)* provides that capacity **to be sued** shall be determined by the law of the state of the individual's domicile or in which the district court is held. All Remaindermen were domiciled in the State of Texas.

At the time of the commencement of the Condemnation Action, *Texas Revised Civil Statute Ann. Art. 1982,* entitled *For Lands Against Decedents,* provided:

> In every suit against the estate of a decedent involving the title to real estate, the executor or administrator, if any, and the heirs shall be made parties defendant. *[Acts 1925,* S.B. 84]

This same language is now *V.T.C.A. Civil Practice & Remedies Code § 17.002.* This principal has been a part of the statutory law of Texas since *Acts 1870,* page 173.

In this statute, the term "heirs", by judicial construction, has been determined to include devisees. *Grohn v. Marquardt,* 487 S.W.2d 214, 217 (Tex. Civ.App.-San Antonio 1972, writ ref'd n.r.e.).

The failure to comply with *Article 1982* in the Condemnation Action, which named Susie McMullen Langille as

a party, subjected the Condemnation Action to subsequent attack by Remaindermen. *Lowman v. Falsetti,* 335 F.2d 632, 638 (5th Cir. 1964); certiorari denied, 379 U.S. 966, 85 S.Ct. 659, 13 L.Ed.2d 560 (1965); *Jones v. Gibbs,* 133 Tex. 645, 130 S.W.2d 274, 275 (1939); *Allen v. Matthews,* 210 S.W.2d 849, 851 (Tex.Civ.App.-Austin 1948, writ ref'd n.r.e.), finding judgment void; *East v. Dugan*, 79 Tex. 329, 15 S.W. 273, 275 (1891).

The twelve (12) year limitation period under 28 U.S.C. § 2409a(g) did not commence to run against Remaindermen until they became vested in possession in the subject parcels in December, 1984. *Klugh v. United States,* 588 F.2d 45 (4th Cir. 1978); *Klugh v. United States,* 818 F.2d 294, 300 (4th Cir. 1987).

All proceedings taken in the Condemnation Action, which relate to the interests of the Corporation and of Remaindermen and which relate to the valuation of their interests in the subject parcels, are void as being violative of their rights to due process and to equal protection, provided for under the *Fifth Amendment to The United States Constitution.*

It its *Memorandum and Order* signed August 14 1997, and

filed August 15, 1997 (Appendix at D, pp. 4-5), the District Court states as follows:

> Boiled down to their essence, the relevant facts of this case, upon which the Court has ordered dismissal, are as follows:
>
> 1. [the Bank] acquired the royalty right in the disputed mineral interest in 1938;
>
> 2. [the Bank] had plenary power to manage the trust assets, including the authority to sue and be sued on behalf of the trust;
>
> 3. the Government condemned the disputed mineral interest in 1950;
>
> 4. the condemnation was amended in 1952 to allow for revestment of mineral estates;
>
> 5. [the Bank] was served with notice of the condemnation in 1955;
>
> 6. [the Bank] did nothing in 1955, nor did [the Bank] do anything when it acquired the remainder of the disputed mineral interest from the Corporation in 1966, and only in 1996 was an action under the Quiet Title Act finally filed.

Specifically, the District Court made no factual finding that Remaindermen had any actual knowledge or notice of the claim of the Government to the mineral interests, prior to the termination of Langille Trust in December, 1984, nor was this finding, which is

necessary to the District Court opinion even remotely possible under the facts of this case.

Therefore, there is no support for the factual finding of the Court of Appeals in its Opinion, as an undisputed fact, that

> Harris and the McMullens [Remaindermen], therefore, were aware of the Government's claim to the mineral interests at least thirty years before this suit was brought. This situation renders the present title challenge barred by the QTA's twelve-year limitation period.

As pointed out above, some of the Remaindermen were minors in 1955, and thus can not be legally charged with notice of anything.

The Application of the Doctrine of Virtual Representation is Contrary to the Law of the Case.

The Court of Appeals in Cause No. 97-40149, *United States v. 85,237 Acres of Land, More or Less, et al*, in its Opinion filed September 17, 1997 (Appendix at G), determined that, since Remaindermen "did not receive notice and did not voluntarily appear in the suit, they were not parties to the condemnation action". (at p. 5).

If Remaindermen had been parties to the Condemnation

Action by virtue of the doctrine of virtual representation, then they/their successors would have been allowed to appear in the Condemnation Action pursuant to the Rule 60(b) Motion, which right they were denied. *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1051 (2d Cir. 1982).

Therefore, under the law of the case, Remaindermen and their interests cannot now be said to have been affected by the Condemnation Action, as necessarily concluded by the District Court in this action. *United States v. 8.41 Acres of Land*, 783 F.2d 1256, 1259 (5th Cir. 1986); cert. denied 479 U.S. 820, 107 S.Ct. 85, 93 L.Ed.2d 38. *United States v. Timmons*, 672 F.2d 1373, 1377-1378 (11th Cir. 1982) (finding res judicata to bind as to issue resolved in earlier case).

The Application of the Doctrine of Virtual Representation is Contrary to *Restatement (Second) of Judgments § 42(1)(e).*

The District Court found as follows:

5. [the Bank] was served with notice of the condemnation in 1955;

6. [the Bank] did nothing in 1955, nor did [the Bank] do anything when it acquired the remainder of the disputed mineral interest from the Corporation in 1966, and only in 1996 was an action under the Quiet Title Act finally filed. (Appendix at D, page 5)

Restatement (Second) of Judgments § 42(1)(e) (1982) provides

> (1) A person is not bound by a judgment for or against a party who purports to represent him if:
>
> (e) The representative failed to prosecute or defend the action with due diligence and reasonable prudence, and the opposing party was on notice of facts making that failure apparent.

The District Court Expressly Recognized a Disputed Fact Issue.

The District Court's *Memorandum and Order* of July 11, 1997 (Appendix at B, p. 11, note 9), noted that Bank One Group claimed that there was an open and obvious conflict of interest between the Bank and Remaindermen. The mineral interests were non-productive at the time of the commencement of the Condemnation Action. Langille Trust was to generate net income to be distributed to the beneficiaries of Langille Trust (Susie McMullen Langille's children) during their lifetimes. The Bank would have been required to expend attorneys' fees in connection

with the Condemnation Action, thereby decreasing the net income available for the income beneficiaries of Langille Trust, but benefitting Remaindermen. Therefore, the District Court properly did not find, as an undisputed fact, that there was an absence of a conflict of interest between the Bank and Remaindermen. Such conflict of interest appears of record and precludes the finding of the Court of Appeals as a matter of law, a finding also necessary to the Court of Appeals' opinion herein.

CONCLUSION

WHEREFORE, Petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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